MALTA

QORTI TAL-MAGISTRATI (MALTA)

MAGISTRAT DR.
FRANCESCO DEPASQUALE

Seduta ta' l-24 ta' Frar, 2014

Avviz Numru. 290/2005

Dottor Joseph Mifsud

vs

Onor Robert Arrigo u Stephen Calleja

Il-Qorti

Rat ir-rikors ippresentat fis-17 ta’ Mejju 2005 fejn ir-rikorrent ghamel referenza ghall artikolu illi deher fil-harga ta’ The Malta Independent tal-Gimgha 6 ta’ Mejju 2005, miktub minn Robert Arrigo u intitolat “The MFA and the EU”, u talab lill-Qorti tiddikjara illi tali artikolu huwa libelluz u malafamanti fil-konfront tieghu peress illi jikkontjeni allegazzjonijiet foloz u malafamanti fil-konfront tar-rikorrent intizi sabiex itellfu jew inaqqsu ir-reputazzjoni tieghu u dana partikolarment metal allegaw, fost affarjiet ohra, li fil-kariga tieghu ta’ President tal-MFA, huwa kellu

agenda politika, ghamel minn kollox biex jirredikola lill-EU u kull min jirrappreenta l-Gvern Nazzjonalista u li jrid ipoggi lill-Malta f'dawl ikrah sabiex jaghmel hsara lill-Gvern Nazzjonalista.

Rat l-artikolu ippubblikat fil-harga tal-Malta Independent tas 6 ta' Mejju 2005 intitolat "The MFA and the EU".

Rat ir-risposta ta' Robert Arrigo ippresentata fl-1 ta' Gunju 205 fejn huwa sahaq li l-artikolu ma huwiex libelluz fil-konfront tal-attur u li jikkonsisti f'espressjoni ta' opinjoni u ghalhekk huwa "*fair comment*", liema kumment ma kellux l-*animus injurjandi*, ossija l-intenzjoni illi jingurja, izda, semmai, kellu l-*animus consulendi*, ossija l-intenzjoni illi jaghti parir lill kull min huwa involut.

Rat ir-risposta ta' Stephen Calleja ippresentat fil 5 ta' Ottubru 2005 fejn huwa segwa l-istess linja difensjonali ta' l-intimat Robert Arrigo, u sahaq illi l-artikolu huwa bbazat fuq fatti veri li jigu ppruvati u kummenti li huma ta' natura ta' *fair comment* li, minn imkien, ma juri li kien hemm *animus injuriandi* fil-konfront tar-rikorrent.

Rat ix-xhieda tar-rikorrent, **Dr Joseph Mifsud**, moghtija fit 3 ta' Mejju 2006 u il-kontro ezami tieghu illi saret fis 17 ta' Ottubru 2006, fil 25 ta' Ottubru 2006 u fil 25 ta' April 2007.

Rat illi fis-seduta tal-25 ta' April 2007, ir-rikorrenti iddikjara illi ma kellux aktar provi x'jippresenta.

Rat ix-xhieda ta' **Kevin Azzopard**i, prodott mill-intimat u awtur ta' artikolu illi deher fil-harga tat-Times of Malta tat-8 ta' Gunju 2004 intitolat "Only three 'foreign' players on the pitch says MFA head" li xehed dwar seminar illi kien sehh ftit jiem qabel organizzat mill-MFA u l-iskamji ta' veduti shan u kombattuti illi kien hemm bejn ir-rikorrent u l-intimat Robert Arrigo, president tas-Sliema Wanderers FC.

Rat ix-xhieda ta' **Joseph Gauci**, Segretarju Generali tal-MFA, moghtija fit 2 ta' Gunju 2008, fil 21 ta' Jannar 2009, fil 25 ta' Mejju 2009 u fl 14 ta' April 2010, fejn huwa

kkonferma illi r-regolamenti kienu inbiddlu minhabba fid-dhul ta' Malta fl-UE u dawna kienu tfasslu mill-MFA kif proposti mir-rikorrent, bhala President taghha, u qatt ma gew ikkontestati mill-UE. Darba minnhom kien hemm talba ghal kjarifika da' parte tal-Gvern Malti, u dina kienet saret kif rikjest, u dana wara illi kienet intbghatet komunikazzjoni da' parte tal-UE dwar possibbilta' ta' tnedija ta' *infringement proceedings* in vista tar-regolamenti tal-MFA.

Rat ix-xhieda ta' **Dr Stefan Zrinzo Azzopardi**, dak iz-zmien President tal-Partit Laburista, moghtija fl-14 ta' April 2010 u fid 19 ta' Ottubru 2010, fejn dana ikkonferma illi r-rikorrent kien ikkontesta l-elezzjoni tas-sena 1987 bhala kandidat tal-Partit Laburista izda inn dakinhar 'l quddiem ma jirrizultax illi baqa' tesserat bhala membru tal-Partit Laburista.

Semghet ix-xhieda ta' **Norman Darmanin Demajo** moghtija fit 23 ta' Jannar 2012, President attwali tal-MFA, illi xehed li bejn is-snin 1992 sa 2001, huwa kien membru ta' l-Ezekuttiv flimkien mar-rikorrent u stqarr li tul tali periodu ir-rikorrent kien President u huwa qatt ma ra xi agenda politika da' parte tar-rikorrent, peress illi politika fl-MFA ma hijiex involuta.

Semghet ix-xhieda ta' **Stephen Calleja**, editur tal-gazzetta The Malta Independent, moghtija fil 21 ta' Mejju 2012, li stqarr li fit 12 ta' Mejju 2005, huwa ippubblika risposta illi l-MFA bghatet ghall-artikolu illi kien gie ippubblikat fis 6 ta' Mejju 2005, u huwa ippubblika l-istess risposta taht it-titolu illi kien inkiteb l-artikolu precendenti, ossija 'The MFA and the EU' sabiex il-qarrej ikun jaf illi dana gie ippubblikat bhala dritt ta' risposta illi l-MFA kellha. Huwa stqarr illi bhala editur, mhux bilfors jaqbel mal-kontenut kollu ta' l-artikoli, peress illi huwa jippubblika kull ma jidher li huwa ta' interess pubbliku.

Semghet ix-xhieda ta' **Robert Arrigo** moghtija fis 17 ta' Settembru 2012 u rat id-dokumentazzjoni minnu esebita.

Rat illi fid 29 ta’ April 2013 il-partijet iddikjaraw illi ma kellhomx aktar provi x’jippresentaw.

Rat in-nota ta’ sottomissjonijiet ippresentata mir-rikorrent fl-10 ta’ Settembru 2013.

Rat in-nota ta’ sottomissjonijiet ippresentata minn Stephen Calleja fit 22 ta’ Novembru 2013.

Rat in-nota ta’ sottomissjonijiet ippresentata minn Robert Arrigo fit 3 ta’ Frar 2014.

Rat illi fis-seduta tat 3 ta’ Frar 2014 il-kawza giet differita ghas-sentenza ghallum.

Ikkunsidrat

Il-kaz odjern jirrigwarda artikolu illi gie ippubblikat fil-harga tal-gazzetta ta’ The Malta Independent fis 6 ta’ Mejju 2005 intitolat ‘The MFA and the EU’ u miktub mill-intimat Robert Arrigo, Membru tal-Parlament kif ukoll President tas-Sliema Wanderers Football Club.

L-artikolu meritu tal-kawza odjerna kien jitkellem dwar il-posizzjoni illi kienet hadet l-Malta Football Association kemm qabel kif ukoll wara id-dhul ta’ Malta fl-Unjoni Ewropeja fl-1 ta’ April 2004, u partikolarment, il-posizzjoni illi il-MFA kienet hadet in rigward ta’ players tal-football barranin li jilghabu gewwa Malta u il-limitazzjonijiet li l-MFA kienet qiegdha taghmel fuq il-clubs Maltin fis-sens illi setghu jilghabu biss tlett barranin fit-team ta’ hdax-il player.

Ir-rikorrent, illi fiz-zmien in kwistjoni kien il-President tal-MFA, oggezzjona ghall-certi kummenti illi kienu saru mill-intimat, u partikolarment il-partijiet segwenti ta’ l-artikolu:

“However, a subtle political agenda has been underway for some time. Ever since Malta’s accession to the EUO, the MFA chief has tried his utmost to ridicule Malta’s membership, ridicule anybody who represents the

Nationalist government, and just listening to one of his speeches, one concludes that the blindness in being anti-EU is not just about young players. Youths are being used to justify the end."

….

"However, once must mentioned that the MFA was the only association which refused to ake part in the pre-accession talks with the negotiating team (my PQ confirms). Now, I am told that the MFA want to meet the EU behind the government's back.

My reading is that the MFA wants Malta to be put in a bad light, so that the Nationalist government is condemned by the EU for discrimination, and gets a reprimand and a possible fine. Will the MFA pay such a fine? Will the council members and officials pay their share is any court condemns such actions?"

Ir-rikorrent jistqarr illi, fil-kapacita' tieghu ta' President tal-MFA, huwa ghamel minn kollox flimkien mal-Kunsill, sabiex jipprotegi l-youth players tal-football wara id-dhul ta' Malta fl-EU u ma huwiex minnu, kif qieghed jallega l-intimat Arrigo, illi huwa ghamel dan sabiex b'xi mod joskura lill-Gvern ta' dak iz-zmien, ossija il-Gvern Nazzjonalista. Huwa stqarr illi ghalkemm kien minnu illi l-MFA ma attendiet ghal ebda pre-accession talks illi kienu qed isiru qabel id-dhul ta' Malta fl-EU fil-Malta EU Steering and Action Committee, l-MFA qatt ma kienet mistiedna tattendi u qatt ma hass illi kien hemm x htiega li jiddiskuti xi affarjiet hemmhekk.

Ir-rikorrent stqarr ukoll illi, filwaqt li kull persuna ghandu dritt illi jiddiskuti direttament mal-Unjoni Ewropeja u d-Direttorati taghha, huwa insista li, ghalkemm qatt ma saru laqghat direttament mal-UE kif allegat mill-intimat, mument mihhom il-Gvern kien gharraf lill-MFA li kien hemm oggezzjoni tal-UE ghar-regoli illi dwarhom tkellem ukoll l-intimat Arrigo, u l-MFA kienet redigiet nota spjegattita li ntbghatet lill-gvern sabiex tdina tigi tirrifletti l-hsibijiet tal-MFA fuq tali oggezzjonijet.

Finalment, ir-rikorrent insista illi ebda Gvern, f'dana il-kaz, ma seta qatt jigi kkundannat ihallas xi tip ta' multa, kif allegat mir-rikorrent, peress illi l-MFA hija awtonoma mill-Gvern u hija l-MFA, semmai, illi kellha tigi kkundannata thallas xi multa, jekk dana kien il-kaz, fatt illi, sahaq ir-rikorrent, qatt ma sehh.

L-intimat Arrigo, da parte tieghu, sahaq illi l-kummenti illi huwa ghamel kienu kumment oggettivi u "fair comment", intizi sabiex jifthu ghajnejn l-MFA dwar il-problemi illi setghu jinfaccjaw rizultat tar-regoli minnhom implimentati u qatt ma kienu intizi sabiex jingurjaw lir-rikorrent izda, semmai, kienu mitkuba bl-'animu consulendi', anke in vista tal-posizzjoni tieghu bhal President ta' Club tal-Football illi kien milqut minn tali regolamenti wkoll. Huwa sahaq illi l-posizzjoni mehudha mill-MFA kienet wasslet sabiex l-UE tikkunsidra tiehu passi kontra l-Gvern Malti u sussegwentement, wara illi l-Presidenza tal-MFA inbidlet, ir-regolamenti inbidlu sabiex il-posizzjoni ktun accettabbli ghall-UE u, di fatti, ebda passi ma ttiehdu kontra Malta.

L-intimat, Calleja, da parte tieghu, apparti illi qajjem id-difiza ta' "fair comment" bhalma ghamel l-artikolist u intimat l-iehor Arrigo fil-proceduri odjerni, sahaq ukoll illi, a tenur ta' l-artikou 21 tal-KAp 248, huwa ppubblika r-rirposta tal-MFA bl-istess prominenza ta' l-artikolu meritu tal-kawza odjerna u ghalhekk ma ghandu jahti ebda responsabbilta' anke f'kaz illi l-artikolu jitqies bhala malafamanti.

Ikkunsidrat

Qabel ma' l-Qorti tidhol aktar fid-dettal dwar il-fatti kif prodotti miz-zewgt partijiet u l-evalwazzjoni taghha ikun opportun illi l-Qorti tikkunsidra l-aspetti legali tad-difiza ta' "fair comment", difiza illi hija titqajjem minn kemm ilhom esistenti l-proceduri ta' libel.

Ghandu jinghad, l-ewwel u qabel kollox, illi l-Att dwar l-Istampa, illi abbazi taghha giet intavolata il-kawza odjerna,

ghalkemm introdotta fit 23 ta' Awwissu 1974 permezz ta' Att XL tas-sena 1974, hija prodott ta' zvilupp tal-Ligi illi kienet tipprecediha, ossija l-Ordinanza V tal-1933, imsejjha l-Ordinanza dwar l-Istampa, hemm kif rappurata f'pagni 2266 sa 2282 ta' l-Edizzjoni Riveduta tal-Ligijiet ta' Malta ippubblikati fil 31 ta' Dicembru 1942. Minn-naha taghha, tali Ordinanza kienet imnieda fit 3 ta' Novembru 1933 sabiex thassar l-Ordinanza Nru XIV ta l-1889 dwar l-Istampa illi kienet giet promulgata mill-Gvernatur Ingliz ta' dak iz-zmien.

Illi ghalhekk, huwa pacifiku jinghad illi l-izvilupp legali illi rat Malta fil-qasam ta' l-Istampa u l-libertaijiet taghha kienu detatti, ghal hafna zmien, mill-izvilupp legali illi l-istess qasam ra fir-Renju Unit u fil-qrati taghha, partikolarment fil-Qorti ta' l-Appell Ingliz. Huwa ghalhekk utili, fid-dibattitu dwar x'ghandu jitqies bhala 'fair comment' jew le, illi jigi ezaminat l-izvlupp illi tali difiza, tul iz-zminijiet, ghamlet fil-Qrati Inglizi, bil-ghan illi tinftiehem aktar kif tali difiza, utilizzata hafna f'dawn iz-zminijiet, ghandha tigi interpretata mill-Qrati Maltin.

F'dana l-istadju, il-Qorti thoss illi jkun opportun illi taghmel referenza ampja ghall-istudju dettaljat u akkademiku illi ghamel il-President tal-Qorti ta' l-Appell Ingliz, Lord Philips fil-kawza "Spiller and another vs Joseph and others" deciza fl 1 ta' Dicembru 2010, fejn l-istess Lord Philips ghamel studju dettaljat ta' l-izvilpp tad-difiza tal-'fair comment', mis-sena 1838 sa llum, liema studju certament huwa ta' gid ghad-diskussjoni dwar 'fair comment' fil-Qrati taghna, u huwa ghalhekk qieghed jigi riprodott in extenso bil-ghan illi jinghata direzzjoni dwar kif tali difiza tista tigi interpretata mill-Qrati taghna.

Dwar id-difiza ta' "fair comment", Lord Philips ghamel is-segwenti osservazzjonijiet:

33. The history of the defence of fair comment is helpfully summarised by Paul Mitchell in Chapter 8 of The Making of the Modern Law of Defamation (2005). It originated at a time when malice was an essential element in the tort of defamation but malice was normally implied unless

rebutted. Originally criticism of literary works and works of art was protected in so far as no presumption of malice arose in respect of such publications. Of necessity such publications identified the subject matter of the comment and it was implicit in some judgments that the matter to which the criticism related would be set out before the criticism was made – see Cooper v Lawson (1838) 8 Ad & E 746. In the first half of the 19th century the subject matter that could found a defence of fair comment was extended to other matters of public interest and, in particular, to the acts of persons in public life – Turnbull v Bird (1861) 2 F & F 508.

34. *Campbell v Spottiswoode* (1863) 3 B & S 769 is perhaps the most important foundation stone of the modern law of fair comment. The plaintiff was a dissenting Protestant minister who had a scheme for advancing the propagation of the gospel in China by promoting the sales of a newspaper containing a series of letters emphasising the importance of this. The defendant published an attack on the plaintiff in a rival newspaper alleging that the plaintiff's motive was not to take the gospel to the Chinese but to make money out of the sales of his newspaper, and that the names and descriptions of subscribers published in the newspaper were fictitious. The publication made it plain that these allegations were no more than inferences, albeit that they were inferences of fact. The court drew a distinction between attacking the scheme and attacking the character of its proponent. Cockburn CJ said, at p 777:

"I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest."

35. Crompton J's judgment was to similar effect. He observed, at p 778:

"Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, the proceedings in courts of justice or in Parliament, or the publication of a scheme or of a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment *on the subject-matter discussed*. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think that, because he has a bona fide belief that he is publishing what is true, that is any answer to an action for libel. With respect to the publication of the plaintiff's scheme, the defendant might ridicule it and point out the improbability of its success; but that was all he had a right to do."

36. It is not entirely clear whether the court was holding that defamatory inferences in relation to motive could be justified provided that they were reasonable, or whether it considered that such inferences had to be justified by showing that they were true. Certainly Mellor J, at pp 782-783, appears to have taken the latter view.

37. In *Merivale v Carson* (1887) 20 QBD 275, 280-281 Lord Esher MR cited the passage from Crompton J's judgment in *Campbell v Spottiswoode* and then addressed the question of what was meant by "fair comment":

"What is the meaning of a 'fair comment'? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say *of the work in question*? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work... .

Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this – would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which

this criticism has said *of the work which is criticised*? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all."

38. The nature of fair comment was further clarified by Collins MR in *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100. The subject of the action was a swingeing condemnation of the merits of a musical play. The Master of the Rolls observed at p 108 that there was no evidence of actual malice, no personal imputations and no allegations of fact. In these circumstances he held at p 112 that if comment was to be "fair" it had to be relevant and not such as to disclose in itself actual malice.

39. In *Dakhyl v Labouchere*, reported at [1908] 2 KB 325, the House of Lords was concerned not with literary criticism but with a publication that described a doctor as a "quack of the rankest species". Lord Atkinson, who made the most substantial speech, expressed the view, at p 329, that a personal attack could form part of a fair comment on facts stated provided that it was a reasonable inference from those facts. His speech was cited at length by Fletcher Moulton LJ in *Hunt v The Star Newspaper Co Ltd* [1908] 2 KB 309. That appeal concerned publications imputing to the plaintiff improper conduct in the discharge of his duties as a deputy returning officer at a municipal election. Thus the complaint related to allegations of fact but the sting of the article was that the conduct of the plaintiff had been politically motivated. The Court of Appeal in that case drew a distinction between the test of fair comment in relation to literary criticism, as laid down in *Merivale v Carson* 20 QBD 275, and the test of fair comment in relation to a personal attack on an individual. In the present context, however, this decision is particularly significant for what was said in respect of the difference between comment and allegations of fact. Because of the significance attached to this judgment in later cases, I shall set out at a little length the most significant extracts, at pp 319-321:

"The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, comment in order to be justifiable as fair comment must

appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v Chapman* (1853) 3 C & K 286. The justice of this rule is obvious. *If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based.* But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair- minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses.

Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment. In the next place, in order to give room for the plea of fair comment *the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails*.

Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation.... To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence. I agree that an allegation of fact may be justified by its being an inference from other facts truly stated, but ... in order to warrant it the jury must be satisfied that such inference ought to be drawn from those facts."

40. Fletcher Moulton LJ, and the other members of the court, thus drew a distinction between (i) defamatory allegations of fact, which had to be clearly and fairly stated, and to be true; (ii) literary criticism, which need not be reasonable but had to be honest, and (iii) imputations of motive amounting to an attack on the character of the plaintiff, which had to be reasonably drawn from the facts.

41. The judgment of Fletcher Moulton LJ is the first that deals with the question of whether the publication must set out or identify the facts upon which the defamatory comment is based. It is implicit in his judgment that it must and for a reason that he explains. The injustice that an unjustified defamatory comment can cause to the plaintiff's reputation will be mitigated if the reader can see the basis of the comment and thus be in a position to appreciate that it is not justified. The Lord Justice contrasted this position with one where the reader concluded that the facts upon which the comment was based were not set out in the article, but were within the personal knowledge of the writer. The clear inference was that the defence of fair comment could not apply to the latter situation.

42. The defence of fair comment again received consideration by the House of Lords in *Sutherland v Stopes* [1925] AC 47. That case was largely concerned with the implications of the "rolled up plea", and I have not found it of much assistance in relation to the issues arising on this appeal. A comment of Viscount Finlay, at p 64, is of interest for the light that it throws on the reason why the question of whether a comment is on a matter of public interest has been held to be one for the judge and not the jury:

"A jury, according to their individual views of religion or policy, might hold the church, the army, the navy, Parliament itself, to be of no national or general importance..."

In so stating Viscount Finlay treated this question as if fair comment was a variety of qualified privilege. Earlier, however, at p 62 he had summarised the law of fair comment as follows:

"The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. *If the facts are truly stated* with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made. To raise this defence *there must, of course, be a basis of fact on which the comment is made*."

43. This, then, was the state of the law when the important case of *Kemsley v Foot* [1951] 2 KB 34; [1952] AC 345 fell to be decided. Lord Nicholls made no reference to this case in *Cheng* [2001] EMLR 777 and Mr Price and Mr Caldecott submit that his fourth proposition is not consistent with it.

44. The publication that was the subject of the claim in *Kemsley v Foot* was an article by Michael Foot in the Tribune that made a virulent attack on an article in the Evening Standard, a newspaper controlled by Lord Beaverbrook. The plaintiff was not, however, Lord Beaverbrook, but Viscount Kemsley, a rival newspaper proprietor. His claim was founded on three words that provided the heading to Michael Foot's article. The words were "Lower than Kemsley". The plaintiff pleaded that the meaning of these words, in their context, was that he used his position as a newspaper proprietor to procure the publication of statements that he knew to be false. The defence included a plea of fair comment on a matter of public interest, said to be the "control by the plaintiff" of the newspapers of which he was proprietor. Particulars of "the specific facts upon which the said words are a fair comment" were provided separately: [1951] 2 KB 34, 40-41. These contained excerpts from the plaintiff's newspapers which were alleged to be inaccurate, untruthful or otherwise colourable.

45. The issue was whether the plea of fair comment should be allowed to stand in circumstances where the article itself set out no facts at all that related to the plaintiff or his newspapers. The judge held that it should not, and struck out the plea of fair comment and the particulars pleaded in support of it. The Court of Appeal reversed his decision and the House of Lords affirmed the decision of the Court of Appeal.

46. The judgments are not easily analysed and the author of the headnote to the decision of the Court of Appeal is to be congratulated on this concise statement of the effect of the judgments of Somervell and Birkett LJJ, with each of whom Jenkins LJ agreed:

"Criticism of a newspaper proprietor directed to the manner in which news is presented in papers controlled by him is to be treated on the same lines as criticism of a

book or a play or other matter submitted to the judgment and taste of the public, and the critic is not to be shut out from the plea of fair comment because in his criticism he had not given or referred to examples of the conduct criticised, so long as the subject-matter of the comment is plainly stated."

47. Somervell LJ, at p 42, identified two situations in which there was no need for a publication to set out details of the facts upon which the comment was based in order to found a defence of fair comment. The first was where the comment was on a play, a book or a work of art, put before the public for its approval or disapproval. The second was where the comment was on the actions of a public man that had been under such vigorous discussion that a bare comment would be taken by the reader as plainly referable to them. The Lord Justice, at p 43, contrasted these with a third situation:

"At the other end of the scale one may imagine a comment reflecting on the integrity of a subordinate official, whose activities had so far received no publicity, where it might be held that the defence was not available unless the facts relied on were substantially set out or indicated. "

He went on, at p 45, to hold that criticism directed at the manner in which a newspaper presented news was to be compared to criticism of a book.

48. Birkett LJ drew a similar distinction. He held, at p 51:

"I do not think it is possible to lay down any rule of universal application. If, for example, a defamatory statement is made about a private individual who is quite unknown to the general public, and who has never taken any part in public affairs, and the statement takes the form of comment only and is capable of being construed as comment and no facts of any kind are given, while it is conceivable that the comment may be made on a matter of public interest, nevertheless the defence of fair comment might not be open to a defendant in that case. It is almost certain that a naked comment of that kind in those circumstances would be decided to be a question of fact and could be justified as such if that defence were pleaded. But if the matter is before the public, as in the case of a book, a play, a film, or a newspaper, then I think

different considerations apply. Comment may then be made without setting out the facts on which the comment is based if the subject matter of the comment is plainly stated."

49. Lord Porter gave the leading speech in the House of Lords: [1952] AC 345. At p 354 he described the question for the House as being

"whether a plea of fair comment is only permissible where the comment is accompanied by a statement of facts upon which the comment is made and to determine the particularity with which the facts must be stated."

50. At pp 355-356 Lord Porter rejected the suggestion that there was a difference in principle between literary criticism of a play, book or newspaper and criticism that implicitly attacked the character of the person responsible for the work in question. He observed that in each case:

"...the subject-matter upon which criticism is made has been submitted to the public, though by no means all those to whom the alleged libel has been published will have seen or are likely to see the various issues. *Accordingly, its contents and conduct are open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter upon which the comment is founded*. I am assuming that the reference is to a known journal: for the present purpose it is not necessary to consider how far criticism without facts upon which to base it is subject to the same observation in the case of an obscure publication."

51. Lord Porter then summarised his conclusions in the following passage, at pp 356-357:

"The question, therefore, in all cases is whether there is a *sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action*, and I find my view well expressed in the remarks contained in *Odgers on Libel and Slander*, 6th Edition (1929), p 166. 'Sometimes, however,' he says, 'it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. *If the defendant accurately states* what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion,

his comment on the plaintiff's conduct. So, if with out setting it out, *he identifies the conduct on which he comments by a clear reference. In either case the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment.* But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. *But if he sets out the fact correctly,* and then gives his inference, stating it as his inference from those facts, such inference will, as a rule be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact.'

But the question whether an inference is a bare inference in this sense must depend upon all the circumstances. Indeed, it was ultimately admitted on behalf of the appellant *that the facts necessary to justify comment might be implied from the terms of the impugned article and therefore the inquiry ceases to be – Can the defendant point to definite assertions of fact in the alleged libel upon which the comment is made?* and becomes – Is there subject matter *indicated with sufficient clarity to justify comment being made? and was the comment actually made such [as] an honest, though prejudiced, man might make?"*

52. Lord Porter went on to deal with a matter which did not arise directly on the appeal, at pp 357-358:

"One further matter on which some discussion took place does not, in my opinion, directly arise on this appeal, but as it may be raised in interlocutory proceedings later in the course of the action, I think it desirable to express an opinion on it. In a case where the facts are fully set out in the alleged libel, *each fact must be justified* and if the

defendant fails to *justify one*, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in [the] particulars delivered in the course of the action? In my opinion, it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory to the plaintiff; but where, as here, *they are contained only in particulars and are not published to the world at large, they are not the subject-matter of the comment but facts alleged to justify that comment.*

In the present case, for instance, the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that press is a low one. As I hold*, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. 20 facts might be given in particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other 19 would not of necessity defeat the defendants' plea.*

The protection of the plaintiff in such a case would, in my opinion, be, as it often is in cases of the like kind, the effect which an allegation of a number of facts which cannot be substantiated would have upon the minds of a jury *who would be unlikely to believe that the comment was made upon the one fact or was honestly founded upon it and accordingly would find it unfair*."

53. At p 360 Lord Porter commented on the passage in the judgment of Fletcher Moulton LJ in *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 that I have quoted at para 39 above:

"He was seeking to distinguish facts from comment and in effect saying that the facts alleged must be such as to warrant an honest man's making the comment complained of. *He had not to consider whether the facts must be set out in full or whether a reference to well known or easily ascertainable facts was a sufficient statement of those relied on.*"

54. Lord Oaksey gave a short concurring speech. He said, at pp 360-361:

"The forms in which a comment on a matter of public importance may be framed are almost infinitely various and, in my opinion, it is unnecessary that all the facts on which the comment is based should be stated in the libel in order to admit the defence of fair comment. It is not in my opinion, *a matter of importance that the reader should be able to see exactly the grounds of the comment. It is sufficient if the subject which ex hypothesi is of public importance is sufficiently and not incorrectly or untruthfully stated.* A comment based on facts untruly stated cannot be fair. What is meant in cases in which it has been said comment to be fair must be on facts truly stated is, I think, *that the facts so far as they are stated in the libel must not be untruly stated*."

55. Lord Porter's remark, at pp 357- 358, that where the facts were fully set out in the alleged libel each fact had to be justified echoed an observation at paragraph 87 of the 1948 Report of the Committee on the Law of Defamation (Cmd 7536), which Lord Porter had chaired. The Report made the following recommendations in relation to this, at paragraph 90:

"We accordingly recommend an amendment of the existing law analogous to that which we have recommended in relation to the defence of 'justification', namely that a defence of 'fair comment upon a matter of public interest' should be entitled to succeed if (a) the defendant proves that so much of the defamatory statements of fact contained in the alleged libel is true as to justify the court in thinking that any remaining statement which has not been proved to be true does not add materially to the injury to the plaintiff's reputation, and (b) the court is also of opinion that the facts upon which the comment is based are matters of public interest and the comment contained in the alleged libel was honestly made by the defendant."

56. Effect was given to the recommendations of Lord Porter's Committee by the following sections of the Defamation Act 1952:

"5 Justification

In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason

only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

6 Fair Comment

In action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

57. It is significant that section 6 refers to "facts alleged or referred to in the words complained of". The section lends no support to the proposition that fair comment can be based on facts which are neither alleged nor referred to in the words complained of.

58. Weight was attached in argument before us to two observations of Lord Denning. He made the first, as Denning LJ, at pp 359-360 in *Adams v Sunday Pictorial Newspapers (1920) Ltd and Champion* [1951] 1 KB 354. The issue was whether interrogatories should be ordered in relation to the question of whether a defendant who was relying on the defence of fair comment had been activated by malice:

"The truth is that the burden on the defendant who pleads fair comment is already heavy enough. If he proves that the facts were true and that the comments, objectively considered, were fair, that is, if they were fair when considered without regard to the state of mind of the writer, I should not have thought that the plaintiff had much to complain about; nevertheless it has been held that the plaintiff can still succeed if he can prove that the comments, subjectively considered, were unfair because the writer was actuated by malice."

59. The more relevant comment for present purposes was that made by Lord Denning MR in *Cohen v Daily Telegraph Ltd* [1968] 1 WLR 916. In that case the defendant pleaded, as matters on which its publication was alleged to be fair comment, facts that had occurred some weeks after the publication. These were struck out and the defendant appealed unsuccessfully to the Court

of Appeal. Lord Denning observed, in an ex tempore judgment, at pp 919-920:
“In order to make a good plea of fair comment, it must be a comment on facts *existing* at the time. No man can comment on facts which may happen in the future. There is a passage in *Gatley on Libel and Slander*, 6 th edition (1967), p 723 which goes further. It says: ‘The facts which the defendant seeks to prove as the basis of his comment must have been known to him when he made the comment.’ I do not know that I would go quite so far as that. A man may comment on existing facts without having them all in the forefront of his mind at the time. Nevertheless it must be a comment on existing facts.”
If, which I doubt, Lord Denning intended to say that a defence of fair comment could be based on facts unknown to the defendant at the time of his comment, the other two members of the court did not agree. Davies LJ stated, at p 920:
“If it is necessary for the man making the comment to know the facts at the time he makes it, it follows as the night follows the day that it is impossible for him to rely on events which at that time had not happened.”
Russell LJ remarked, at p 921, that it was not disputed that the facts upon which a defence of fair comment were based could only be those known at the time of publication. Subsequently, in *London Artists Ltd v Littler* [1969] 2 QB 375, 391, Lord Denning MR stated:
“In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter: see *Cunningham-Howie v. Dimbleby* [1951] 1 KB 360,364. They are the facts on which the comments are based or from which the inferences are drawn – as distinct from the comments or inferences themselves. The commentator need not set out in his original article all the basic facts: see *Kemsley v. Foot* [1952] AC 345; but he must get them right and be ready to prove them to be true.”
60. Judicial opinion in relation to this area of the law did not change over the next 20 years. In *Brent Walker Group plc v Time Out Ltd* [1991] 2 QB 33 the issue was whether the defence of fair comment could be based on unproven statements if these were made on a privileged occasion.

The Court of Appeal held that it could, but only if the publication set out a fair and accurate report of the proceedings in which the privileged statements were made. Bingham LJ made the following summary of the law of fair comment, at p 44:

“The civil law of libel is primarily concerned to provide redress for those who are the subject of false and defamatory factual publications. Thus in the simplest case A will be entitled to relief against B if B publishes a defamatory factual statement concerning A which B cannot show to be true. The law is not primarily concerned to provide redress for those who are the subject of disparaging expressions of opinion, and freedom of opinion is (subject to necessary restrictions) a basic democratic right. It is, however, plain that certain statements which might on their face appear to be expressions of opinion (as where, for example, a person is described as untrustworthy, unprincipled, lascivious or cruel) contain within themselves defamatory suggestions of a factual nature. Thus the law has developed the rule already mentioned that comment may only be defended as fair if it is comment on facts (meaning true facts) *stated or sufficiently indicated*. Failing that, the comment itself must be justified.”

Bingham LJ went on to hold, at p 45, that fairness to the subject of a defamatory comment based on a privileged statement required that the commentator should at least base his comment on a fair and accurate account of the occasion on which the statement was made.

61. Part of the problem with the defence of fair comment relates to the identification of which, if any, elements of the defence are subjective and which are objective. This question bears intimately on the question of burden of proof in relation to the various elements. These questions received detailed consideration by the Court of Appeal and the House of Lords in *Telnikoff v Matusevitch* [1991] 1 QB 102; [1992] 2 AC 343.

62. The plaintiff complained of a letter published by the defendant about an article written by the plaintiff. The primary issue was whether the defendant could refer to portions of the article not quoted in his letter in order to demonstrate that the letter consisted of comment rather

than statements of fact. Reversing the Court of Appeal, the majority of the House of Lords held that he could not. A defence of fair comment could not be made out unless it was apparent from the publication itself that the matter complained of was comment rather than an allegation of fact.

63. In the course of a dissenting opinion, Lord Ackner remarked, at p 361:

"In my judgment the defence of fair comment is not based on the proposition that every person who reads a criticism should be in a position to judge for himself. It would be absurd to suggest that a critic may not say what he thinks of a play performed only once, because the public cannot go and see it to judge for themselves. The defence of fair comment is available to a defendant who has done no more than express his honest opinion on publications put before the public. It is sufficient for him to have identified the publication on which he is commenting, without having set out such extracts there from as would enable his readers to judge for themselves whether they agreed with his opinion or not."

64. A subsidiary but important issue was what it was that a defendant had to prove in order to establish the defence of fair comment. Counsel for the plaintiff submitted that the defendant had to establish that: (i) the words complained of were comment; (ii) the comment was on facts; (iii) the facts commented on constituted a matter of public interest; (iv) the comment was objectively "fair"; that is the comment was one that was capable of being honestly founded on the facts to which it related, albeit by someone who was prejudiced and obstinate; (v) the comment represented the defendant's honest opinion. If he discharged all these burdens, the defence could none the less be defeated by proof of malice on the part of the defendant, but the onus of proving malice lay on the plaintiff. Both the Court of Appeal and the House of Lords held that there was no burden on the defendant to establish the fifth element. The defendant's honesty was assumed unless the plaintiff could disprove it by establishing malice.

65. The most significant development of the common law of defamation in recent times has been the creation of

"*Reynolds* privilege". In the course of his speech in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 Lord Nicholls made some comments in relation to the defence of fair comment which were a precursor to what he subsequently said in *Cheng* [2001] EMLR 777*.* At p 193, he said:

"It is important to keep in mind that this defence is concerned with the protection of comment, not imputations of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere. Further, to be within this defence the comment must be recognisable as comment, as distinct from an imputation of fact. *The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made"* see the discussion in *Duncan & Neill on Defamation*, (1983), pp 58- 62."

At p 201 he referred to the fact that proof of malice denied protection to defamatory statements, whether of comment or fact. He added:

"In the case of statements of opinion on matters of public interest, that is the limit of what is necessary for protection of reputation. Readers and viewers and listeners can make up their own minds on whether they agree or disagree with defamatory statements which are recognisable as comment and *which, expressly or implicitly, indicate in general terms the facts on which they are based*."

66. I cited at the outset of this judgment the five propositions in relation to fair comment advanced by Lord Nicholls in *Cheng* under the heading "Fair Comment: The Objective Limits". At para 41 of that case he returned to the fourth proposition under the heading "Motive":

"Proof of malice is the means whereby a plaintiff can defeat a defence of fair comment where a defendant is abusing the defence. Abuse consists of using the defence for a purpose other than that for which it exists. The purpose for which the defence of fair comment exists is to facilitate freedom of expression by commenting on matters of public interest. This accords with the constitutional guarantee of freedom of expression. And it is in the public interest that everyone should be free to express his own, honestly held views on such matters,

subject always to the safeguards provided by the objective limits mentioned above. These safeguards ensure that defamatory comments can be seen for what they are, namely, comments as distinct from statements of fact. *They also ensure that those reading the comments have the material enabling them to make up their own minds on whether they agree or disagree."*

67. Lord Nicholls broke new ground in holding that malice in the context of fair comment had a different meaning from malice in the context of qualified privilege. In the former context, the motive for making the comment was irrelevant. All that mattered was whether or not the commentator honestly believed in the truth of his comment. This was an evolution of the view that Lord Nicholls had expressed in *Reynolds* at [2001] 2 AC 127, 201:

"Freedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth".

68. The authors of *Gatley*, 11th edition, comment, at para 12.25:

"Formerly, it was widely believed that the idea of malice was essentially the same in fair comment [as in qualified privilege] and that the cases were essentially interchangeable. It has now been demonstrated that this is incorrect."

The last sentence is a remarkable tribute to the standing of the Court of Final Appeal of Hong Kong and, more particularly, of Lord Nicholls.

69. In holding that not even spite or ill-will constituted malice, Lord Nicholls [2001] EMLR 777, para 48 once again returned to his fourth proposition:

"Thus, the comment is one which is based on fact; it is made in circumstances where those to whom the comment is addressed can form their own view on whether or not the comment was sound; and the comment is one which can be held by an honest person."

70. Lord Nicholls' fourth proposition has come under attack before that launched in the present action. It is questioned in *Duncan & Neill* 3rd ed at para 13.20 and in *Gatley* at para 12.8. Eady J dissented from it at para 57 of his judgment in *Lowe v Associated Newspapers Ltd*

[2006] EWHC 320 (QB); [2007] QB 580. That decision merits attention, for it contains the carefully considered views of a judge who has great experience of the law of defamation on the subject matter of the present appeal. The publication complained of in that case was a short paragraph about matters that will have been of interest to a large number of football supporters: the replacement of the Manager of Southampton Football Club and the claimant's acquisition of ownership of the Club by a reverse takeover. The defendant's primary case was that the paragraph complained of contained comment and was protected by the defence of fair comment. In the alternative, in case the publication should be held to consist of fact rather than comment, there was a plea of justification. The defendant pleaded some 19 pages of facts which were claimed to support both the plea of fair comment and the plea of justification. No less than 16 interlocutory applications were listed before the judge, but the issues to which his judgment was essentially directed were:

. i) To what extent is it necessary for a defendant relying upon fair comment to be able to demonstrate that the facts upon which the comment was based are to be found in the text of the words complained of?

. ii) How far must the author of the words complained of be aware at the time of publication of the facts sought to be relied upon to support the comment?

Eady J carried out a detailed analysis of many of the authorities to which I have referred and reached the following conclusions:

. (1) Any fact pleaded to support fair comment must have existed at the time of publication.

. (2) Any such facts must have been known, at least in general terms, at the time the comment was made, although it is not necessary that they should all have been in the forefront of the commentator's mind.

. (3) A general fact within the commentator's knowledge (as opposed to the comment itself) may be supported by specific examples even if the commentator had not been aware of them (rather as examples of previously published material from Lord Kemsley's newspapers were allowed).

. (4) Facts may not be pleaded of which the commentator was unaware (even in general terms) on the basis that the defamatory comment is one he *would have* made *if* he had known them.

. (5) A commentator may rely upon a specific or a general fact (and, it follows, provide examples to illustrate it) even if he has forgotten it, because it may have contributed to the formation of his opinion.

. (6) The purpose of the defence of fair comment is to protect honest expressions of opinion, or inferences honestly drawn from, specific facts.

. (7) The ultimate test is the objective one of whether someone could have expressed the commentator's defamatory opinion (or drawn the inference) *upon* the facts known to the commentator, at least in general terms, and upon which he was purporting to comment.

71. I have some difficulty with propositions (3) and (5). I do not understand the nature of the "support" for facts within the commentator's knowledge that can be derived from facts of which he was not aware. Nor is it easy to understand how a commentator can know that a fact is one that he has forgotten.

72. Dissenting from Lord Nicholls' fourth proposition in *Cheng* Eady J said this, at para 57:

"Whilst it is necessary for readers to distinguish fact from comment, it is not necessary for them to have before them all the facts upon which the comment was based for the purpose of deciding whether they agree with the comment (or inference). I draw that conclusion with all due diffidence, since Lord Nicholls has twice expressed the opposite view, but it does seem consistent with principle and, in particular, with the undoubted rule that people are free to express perverse and shocking opinions and may nevertheless succeed in a defence of fair comment without having to persuade reasonable readers, or the jurors who represent such persons, to concur with the opinions. It is difficult to see why it should matter whether a reader agrees; what matters is whether he or she can distinguish fact from comment. Sometimes that will be possible, as it was in Kemsley v Foot, without any facts being stated expressly, because either they are referred

to or they are sufficiently widely known for the readers to recognise the comment as comment."

73. This concludes my summary of the authorities which form the basis of the discussion that is to follow. Before proceeding to that discussion it is necessary, however, to consider the Strasbourg jurisprudence, for Mr Price invoked article 10 of the European Convention on Human Rights ("the Convention") and it is necessary for this court, when considering suggested developments of the common law of defamation, to take account of the Convention and the jurisprudence of the Strasbourg Court.

74. Article 10 of the Convention provides: "Freedom of Expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

75. In *Karako v Hungary* (Application No 39311/05) (unreported) given 28 April 2009, where the applicant invoked article 10, the Strasbourg Court held at para 23 that there was no conflict between this article and article 8, which protects the right to respect for private life. Reputation was only the external evaluation of the individual and damage to reputation would not necessarily impact on the inner integrity which article 8 protects. In *Pfeifer v Austria* (2007) 48 EHRR 175, however, where the applicant invoked article 8, another section of the

Court held at para 35 that a person's reputation formed part of his or her personal identity and psychological integrity, and thus fell within the scope of "private life" to which article 8 applied. I think that it is obvious that the right to freedom of expression is in potential conflict with the right to private life and that the fact that each right is qualified means that the law must strike an appropriate balance between the two. As to the striking of that balance it is possible to draw a number of principles from the Strasbourg jurisprudence.

76. The relevant principles are helpfully summarised at paras 28 and 29 of *Sorguc v Turkey* (Application No 17089/03) (unreported) given 23 June 2009. Freedom of speech may be restricted in order to protect reputation where this is necessary in a democratic society to meet a pressing social need. Thus a test of proportionality has to be applied. In applying that test there is a significant distinction between a statement of fact and a value judgment. A statement of fact will be true or untrue and the law can properly place restrictions on making statements of fact that are untrue. A value judgment is not susceptible of proof so that a requirement to prove the truth of a value judgment is impossible to fulfil, and thus infringes article 10.

"However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment may be excessive if it has no factual basis to support it – *Jerusalem v Austria* (2003) 37 EHRR 567, para 43."

In *Lindon. Otchakovsky-Laurens and July v France* (2007) 46 EHRR 761 the Grand Chamber went further, stating at para 55:

"The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive."

77. In *Nilsen and Johnsen v Norway* (1999) 30 EHRR 878, para 50 the court equated the imputation of improper

motives or intentions with value judgments rather than statements of fact, having regard to the fact that from the wording of the statements and their context it was apparent that they were intended to convey the applicants' own opinions.
78. The Strasbourg Court also attaches importance to the extent to which the subject of a publication is a matter of public interest. The limits of acceptable criticism are wider in relation to politicians acting in their public capacity than in relation to private individuals – *Jerusalem v Austria* (2001) 37 EHRR 567, para 38. In *Hrico v Slovakia* (2004) 41 EHRR 300, para 40g the court observed that there was little scope under article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest.
79. These expressions of principle are in general consonant with the English law of defamation. If anything they suggest that the restrictions on the right to express opinion imposed under the law of fair comment may be over-exacting. They do not, however, afford assistance with the question of the extent to which it is a proportionate element of the law of fair comment to require that a statement of defamatory opinion should include or identify the facts upon which the opinion is based.

Ikkunsidrat dina d-deskrizzjoni ferm studjata dwar l-izvilupp tad-difiza tal-"fair comment" kif maghmulha minn Lord Philips, qabel ma l-Qorti tghaddi biex taghmel il-konsiderazzjoniet taghha dwar il-kaz odjern, jkun utili illi taghmel referenza ukoll ghal decizjoni recenti illi tat il-Qorti Europea ghad-Drittijiet tal-Bniedem, osija '**Delfi AS vs Estonia**' deciza fl 10 ta' Ottubru 2013, fejn dina qalet is-segwenti:
"Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance

and broadmindedness without which there is no ‘democratic society’. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

…..

The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see Chauvy and Others, cited above, § 70; Pfeifer v. Austria, no. 12556/03, § 35, 15 November 2007; and Polanco Torres and Movilla Polanco v. Spain, no. 34147/06, § 40, 21 September 2010). In order for Article 8 to come into play, however, an attack on a person’s reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see A. v. Norway, no. 28070/06, § 64, 9 April 2009, and Axel Springer AG v. Germany [GC], no. 39954/08, § 83, 7 February 2012).

….

The Court has considered that where the right to freedom of expression is being balanced against the right to respect for private life, the relevant criteria in the balancing exercise include the following elements: contribution to a debate of general interest, how well known the person concerned is, the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed (see Axel Springer AG, cited above, §§ 89-95, and Von Hannover (no. 2), cited above, §§ 108-113).”

Ikkunsidrat

Ikkunsidrati dawna l-konsiderazzjonjiet legali li saru minn Qrati illi lejhom l-Qrati Maltin regolarment iharsu ghal direzzjoni legali f'diversi qosma, inkluz dik ta' l-Istampa, il-Qorti trid tghaddi biex tikkunsidra l-fatti tal-kaz.

Jirrizulta mill-provi prodotti illi ir-rikorrent, fil-mument illi nieda l-proceduri odjerni, kien President tal-Malta Football Association. Tali posizzjoni, ghalkemm ma tistax titqies bhala wahda politika fil-kuntest ta' l-arena politka illi tahkem il-gzejjer Maltin, certament titsta titqies bhala wahda pubblika u wahda illi tigbed lejha hafna attenzjoni mill-pubbliku in generali, xi drabi aktar minn dik ta' politici, peress illi, kif inhuwa fatt maghruf, il-football f'Malta huwa suggett diskuss u kombattut hafna, okkazzjonalment aktar minn suggetti politici, u ghalhekk, kif del resto ammess anke mir-rikorrent stess, il-posizzjoni ta' President tal-MFA, ghalkemm mhix wahda politika, hija wahda ferm soggetta ghall-iskrutinju pubbliku, daqs politiku. Bhala rizultat, il-principji stabbiliti f'*Lingens vs Austria* dwar livell ta' kritika accettabbli fil-konfront ta' bniedem politiku ghandhom japplikaw ukoll lill-President tal-MFA, kemm bhala persuna pubblika kif ukoll bhala persuna importanti fil-qasam tal-football lokali.

Jirrizulta mill-provi prodotti illi, fil 15 ta' April 2004, gimghatejn wara illi Malta dahhlet bhala membru shih fl-Unjoni Ewropeja, l-MFA approvat regoli godda li kienu jinkludu, fost affarjiet ohra, illi ebda club tal-football Malti ma seta jaghmel uzu, f'loghba tal-football, minn ta' lanqas tmien players li kienu ilhom registrati Malta ghal anqas tlett snin qabel fil-'youth division' tal-MFA.

Jirrizulta wkoll illi fis-7 ta' Gunju 2004, sar Seminar mill-MFA dwar id-dhul ta' dawna ir-regoli, ghal liema seminar attendew hafna persuni involuti fil-qasam tal-football lokali, fosthom l-intimat, bhala President tas-Sliema Wanderers Football Club. F'tali seminar, jidher illi bejn ir-rikorrent u l-intimat Arrigo kien hemm diverbju kbir u pubbliku dwar l-implimentazzjoni ta' tali regoli illi wasslu lir-rikorrent ikun rappurtat li qal " I am adamant to safeguard our football … the MFA does not care what the EU exponents say". L-istess rikrorent huwa kkwotat mill-

gurnal The Times jghid “Clubs that decide to chalenge us in court over these matters will be thrown out as stipulated in the MFA statute”, liema kliem jidher car illi kienu indirizzati lejn il-club ta’ l-intimat Arrigo, li kien qieghed jikkontesta tali regoli.

Jirrizulta wkoll illi fl-24 ta’ Marzu 2005, il-Gvern Malti ircieva ittra Minghand id-DG ghall-Impjiegi, l-Affarjiet Socjali u l-Opportunitajiet Indaqs tal-Kumissjoni Ewropeja fejn gie indikat li “fejn ghandhom x’jaqsmu il-pleyers (sic) professjonali tal-futbol u l-impjiegi taghhom f ‘Malta, r-regoli tal-Malta Football Association imorru kontra r-regoli ta’ l-Unjoni Ewropeja”.

Jirrizulta illi, sussegwentement, fuq rikjesta tal-Ministru ta’ l-Edukazzjoni u Sport ta’ dak iz-zmien, Dr. Louis Galea, ir-rikorrent, bhala President ta’ l-MFA, ghamel ‘Nota ta’ Osservazzjonijiet’ bil-veduti tal-MFA dwar il-posizzjoni mehudha mill-EU filwaqt illi stqarr illi “l-attitudni da parti ta’ dan id-DG taghti lill MFA id-dritt li tinforma lill Membri taghha illi l-burokrazija tal-EU qed tipprova tfittex li taghmel hsara lill football Malti, lit-tfal u zghazagh Maltin u lis-socjeta Maltija”.

Jirrizulta, finalment, mix-xhieda ta’ l-intimat, mhux kontradetta, illi tali regoli, wara illi r-rikorrent spicca minn President tal-MFA, eventwalment inbidlu sabiex ma jittiehdu ebda proceduri mill-Kummissjoni tal-UE u sabiex jirrispettaw ir-regolamenti tal-UE dwar liberta fl-impjiegi.

Ikkunsidrat

La darba gew ikkunsidrati il-fatti tal-kaz, u kunsidrati wkoll il-principji stabbiliti fill-Qrati Inglizi dwar id-difiza ta’ ‘fair comment’, kif spjegati minn Lord Philips, il-Qorti thoss illi jkun opportun illi jigu ezaminati l-hames elementi imsemmija minn Lord Philips sabiex jigi stabbilit jekk, fil-kaz odjern, dak illi intqal kienx 'fair comment' jew le.

(i) "*the words complained of were comment*" - ma hemmx dubju mill-kontenut ta’ dak li qal l-intimat fl-artikolu

tieghu, illi dak li kien hemm imnizel kien kumment fuq is-sitwazzjoni vigenti f'Malta dak iz-zmien fil-qasam ta' players tal-football fi klub Malti. Il-kummenti illi dwahrom ir-rikorrent qieghed jilmenta ma humiex dikajrazzjoni ta' fatti, izda ghandhom jitqiesu bhala kummenti illi ghamel l-intimat wara illi l-istess indika b'mod car x'kienu l-fatti illi dwarhom huwa kienqieghed jikkummenta. Dana iwassal il-Qorti biex tikkunsidra it-tieni element.

(ii) "*the comment was on facts*" - mill-provi kif prosotti mill-partijiet, jidher illi huwa fatt mhux kontestat illi ddahhlu regoli da' parte tal-MFA, wara illi Malta dahhlet fl-UE, fejn gie limitat in-numru ta' barranin illi jistghu jilghqbu f'team tal-futball f'Malta. Jidher ukoll mill-fatti prodotti illi tali regolamenti wasslu sabiex l-UE jqishom in vjolazzjoni tar-regolamenti tal-UE u talbu l-kummenti tal-Gvern Malti qabel ma jniedu ufficjalment proceduri ta' 'infringement' kontra l-Gvern Malti.

(iii) "*the facts commented on constituted a matter of public interest*" - il-Qorti ma ghandha ebda dubju li kwalsiasi kumment illi jsir f'Malta li jirrigwarda l-isport tal-football huwa ta' interess pubbliku, peress illi l-football f'Malta huwa suggett li jqajjem interess kbir, stante illi huwa l-akbar sport f'Malta u l-aktar wiehed li jqajjem kemm interess u kontroversji b'mod illi ma hemm assolutament ebda dubju li l-fatti diskussi fl-artikolu kienu ta' interess ghall-pubbliku kollu in generali.

(iv) "*the comment was objectively "fair"; that is the comment was one that was capable of being honestly founded on the facts to which it related, albeit by someone who was prejudiced and obstinate*;" - Fil-mod kif gie redatt l-artikolu meritu tal-kawza odjerna, il-qarrejj ordinarju inghata infromazjzoni sufficjenti sabiex jgharbel l-informazjzoni kollha moghtija u jasal ghal konkluzjoni informata dwar dak illi kien qieghed jilmenta dwaru l-intimat. Kif jghid Lord Nicholls fil-kummentarju tieghu fic-Cheng (2001),

> *the comment is one which is based on fact; it is made in circumstances where those to whom the comment is addressed can form their own view on whether or not the comment was sound; and the comment is one which can be held by an honest person.*

(v) "*the comment represented the defendant's honest opinion*." - Ghalkemm wiehed forsi jista ma jaqbilx ghal kollox mal-kummenti u konkluzjonijiet milhuqa mill-intimat fl-artikolu minnu redatt, ma hemm ebda dubju illi l-kummenti maghmulha mill-intimat kienu jirrispejjkaw il-hsieb onest ta' l-intimat dwar il-posizzjoni mehudha mill-MFA fil-konfront tal-UE.

Ikkunsidrat
Mill-fatti kollha kif fuq prodotti w il-konsiderazzjonijiet legali illi saru, il-Qorti hija tal-konvinciment illi l-intimati irnexxilhom jipprovaw, sal-livell rikjest kif fuq ahjar deskritt, illi l-kummenti illi huwa ghamel fl-artikolu meritu tal-kawza odjerna, u li dwarhom ir-rikrorent kien qieghed jilmenta, kienu 'fair comment', u ghalhekk mhux soggett ghall-skrutinju ulterjuri da' parte ta' dina l-Qorti, peress illi ma jistghux jitqiesu bhala malafamanti u libelluzi fil-konfront tar-rikorrent, stante illi saru fl-isfond ta' socjeta libera u demokratika bhalma hija dik Maltija li tiftahar li l-liberta ta' l-espressjoni, kif protetta mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem, huma protetti u in linea mal-kuncetti ta' "pluralism, tolerance and broadmindedness without which there is no 'democratic society".

Konkluzjoni

Il-Qorti

Wara illi rat il-provi kollha prodotti u rat is-sottomissjonijiet ta' l-abbli difensuri tal-partijiet.
Wara illi rat il-konsiderazzjonijiet fattwali u legali tal kaz.
Taqta' u tiddeciedi billi
Tilqa' l-eccezzjonijiet ta' l-intimati u ghalhekk
Tichad it-talba attici kif dedotta.
Spejjez tal-proceduri odjerni ikunu a kariku tar-rikorrenti.

< Sentenza Finali >

----------TMIEM----------